LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
MAR 23 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 108

SEARS, ROEBUCK AND CO.,
Petitioner,

vs.

THE STIFFEL COMPANY,
Respondent.

RESPONDENT'S PETITION FOR REHEARING.

WARREN C. HORTON,
MARSHALL W. SUTKER,
208 South LaSalle Street,
Chicago, Illinois, 60604,
MAX R. KRAUS,
105 West Adams Street,
Chicago, Illinois, 60603,
Attorneys for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 108.

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

THE STIFFEL COMPANY,

Respondent.

RESPONDENT'S PETITION FOR REHEARING.

Respondent, The Stiffel Company, respectfully petitions the Court for a rehearing and reconsideration of its Decision and Opinion herein of March 9, 1964.

THE RECORD DOES NOT SUPPORT THE FINDING THAT SEARS' LAMPS OR PACKAGES IN WHICH THEY WERE DELIVERED TO CUSTOMERS WERE MARKED OR LABELLED TO INDICATE SOURCE.

In the Court's Opinion of March 9, 1964, in summarizing the facts, it is stated that as to Sears' lamps "—labels appeared on the cartons in which they were delivered to customers—." It is respectfully submitted that this is not factually correct.

In the District Court and in the Court of Appeals, Sears never contended that its pole lamps or their packages were

labelled or marked in any way to identify them as Sears' products or as products of its manufacturer, Randolph Metal Works. Sears tacitly admitted such lack of identification for it never disputed nor denied the lack of identification which Stiffel pointed out in testimony and repeatedly in its arguments and briefs in the District Court and in the Court of Appeals. The Court of Appeals' Decision, reviewed on certiorari, expressly relies upon the statements of fact made by both parties to that court and correctly sums up such representations in the statement in its Opinion of January 23, 1963 that "Sears' lamps are not labelled * * *." (R. 113.)

At the trial in the District Court, testimony was presented by Stiffel that the pole lamp purchased by it from Sears had no tag and no label and that "everything that came with the pole" (R. 28) was then and there produced by the witness. There was no tag; there was no label; there was no marking of any kind of source identification.

The plaintiff Stiffel purchased two pole lamps from Sears (R. 30), one being Pl. Ex. 10 which is before the Court, and the other being identical thereto. One of the lamps so purchased was still in the shipping carton in which it was sent by Randolph Metal Works to the Sears' store in Greensboro, North Carolina. This had a shipping label with the return address of the shipper, Randolph Metal Works. It was not a label stating that Randolph Metal Works was the manufacturer of the lamp, although The Stiffel Company, being itself a lamp manufacturer and familiar with others in that field, recognized the name and surmised correctly therefrom that Randolph Metal Works was the manufacturer of the Sears' pole lamps. Very obviously the general purchasing public would not have had such knowledge even if it were true that lamps which such people purchased from Sears would have included a similar shipping label, and there is no evidence that such was the

practice or that such ever occurred except as to one of the two poles purchased by Stiffel from Sears.

Although Sears filed a Petition for Rehearing in the Court of Appeals in this case, it made no contention even in that Petition that its pole lamps were marked or labelled in any way.

THE PETITION FOR CERTIORARI HEREIN MADE NO CONTENTION THAT SEARS' PRODUCT WAS IN ANY WAY LABELLED OR IDENTIFIED AS TO SOURCE.

In the Sears' Petition for Certiorari in this case, Sears in its *Statement of Facts* and in its *Argument* made no contention or suggestion that its pole lamps were in any way marked or labelled as to source nor did it make any contention that the Court of Appeals' Decision was erroneous in its statement that the Sears' product was not labelled.

The lack of labelling as to source by Sears or its manufacturer was expressly called to this Court's attention in the Stiffel Brief in Opposition to the Petition for Writ of Certiorari, in which brief respondent called attention to the decisions of this Court in *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111 and *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, in both of which decisions this Court held that even if one had the right to copy another's product, it had to exercise such right "fairly", and fairness certainly requires such identification.

That Sears still tacitly conceded lack of identification of its product is evident from its Main Brief filed after certiorari was granted, in which lack of identification as to source is nowhere disputed either in the *Statements of Fact* or in *Argument*.

It was not until the Petitioner's Reply Brief that it was ever even contended in this case on behalf of Sears that

there had been any kind of labelling or identification whatsoever. That of course was the final brief filed and the point was raised by Sears knowing that it could not be answered by respondent in a further brief.

Even in the Sears' Reply Brief, it was only contended that respondent was informed that the Sears' pole lamp was manufactured by Randolph Metal Works, at which time reference was made to a portion only of the testimony at page 28 of the Record. Not even there did Sears contend that its pole lamps were identified in any way as to source so far as the general purchasing public was concerned.

IF THERE BE ANY UNCERTAINTY AS TO SOURCE IDENTIFICATION BY SEARS, THE CASE SHOULD BE REMANDED FOR CLARIFICATION OF THAT FACT.

We respectfully submit that the record in this case does not support a finding that "labels appeared on the cartons in which they" (Sears) "were delivered to customers."

The Opinion herein cites with approval both *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111 and *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, and it would seem therefore that the Court regards both of those decisions to be sound statements of the applicable law. If those decisions are not modified or reversed by the Decision of March 9, 1964 herein, then it would seem that this Court's Opinion is based upon an erroneous assumption of fact as to labelling of the Sears' pole lamp.

CONCLUSION.

It is respectfully submitted that reconsideration should be given as to the factual situation of identification of the Sears' pole lamp and that this Court's decision should be modified accordingly or that there be remand to the District Court to take further proofs on that point.

Respectfully submitted,

THE STIFFEL COMPANY,
By WARREN C. HORTON,
MARSHALL W. SUTKER,
208 South LaSalle Street,
Chicago, Illinois, 60604,

MAX R. KRAUS,
105 West Adams Street,
Chicago, Illinois, 60603,
Attorneys for Respondent.

Certificate.

Warren C. Horton certifies that the foregoing Petition is presented in good faith and not for purposes of delay, and that he believes it to be well-founded in fact.

Warren C. Horton

Warren C. Horton.

Certificate of Service.

Warren C. Horton certifies that the within Petition for Rehearing was served upon counsel for Petitioner by mailing copies to them this 20th day of March, 1964, postage duly prepaid, addressed as follows:

Will Freeman, Esq.
D. D. Allegretti, Esq.
George B. Newitt, Esq.
135 S. LaSalle St.
Chicago, Illinois.

Leo H. Arnstein, Esq.
Frank H. Marks, Esq.
120 South LaSalle St.
Chicago, Illinois.

Warren C. Horton

Warren C. Horton.